12 CV 4339 (ALC)(JLC)

PLAINTIFFS' MOTION FOR PRELIMINARY

AFFIDAVIT OF

KENNETH CHOW

IN SUPPORT OF

CLASS ACTION CERTIFICATION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

FERNANDO HERNANDEZ, KENNETH CHOW, BRYANT WHITE, DAVID WILLIAMS, MARQUIS ACKLIN, CECILIA JACKSON, TERESA JACKSON, MICHAEL LATTIMORE and JUANY GUZMAN, Each Individually, And On Behalf Of All Other Persons Similarly Situated,

Plaintiffs,

-against-

THE FRESH DIET INC.,
LATE NIGHT EXPRESS COURIER SERVICES, INC. (FL),
FRESH DIET EXPRESS CORP. (NY),
THE FRESH DIET - NY INC. (NY),
FRESH DIET GRAB & GO, INC. (FL) a/k/a
YS CATERING HOLDINGS, INC. (FL) d/b/a
YS CATERING, INC. (FL),
FRESH DIET EXPRESS CORP. (FL),
SYED HUSSAIN, Individually,
JUDAH SCHLASS s/h/a JUDAH SCHLOSS, Individually,
and ZAIMI DUCHMAN, Individually

Dejendants.		
	X	

KENNETH CHOW, being duly sworn and subject to the penalties for perjury, deposes and says:

- 1. I am a New York resident and a former driver/food delivery employee for the Defendants.
- I was employed by the Defendants from approximately November 2008 to late
 April 2012.
- 3. I am a named Plaintiff in this action. I submit this affidavit in support of Plaintiffs' motion to certify this matter as a class action pursuant to Fed. R. Civ. P. 23. and based on the

laws of the State of New York, including the New York State Labor Law, with me as one of the class representatives.

- 4. I submit this affidavit based on my personal knowledge and I am prepared and competent to testify to the matters set forth in this affidavit.
- 5. My job responsibilities as a driver/food delivery employee consisted of showing up to The Fresh Diet, Inc.'s Brooklyn facilities, receiving instructions as to my delivery routes, obtaining prepared meals, and personally delivering them to The Fresh Diet, Inc.'s customers throughout New York City and the tri-state metropolitan region, including locations in New York, New Jersey and Connecticut. After completing the meal deliveries, I would have to return to The Fresh Diet, Inc.'s Brooklyn facilities to check back in, complete required paperwork and return empty Fresh Diet bags.
- 6. Throughout my employment, my work was performed under the supervision, direction and control of Defendant Syed Hussain, who was the New York City-area Regional Delivery Manager for The Fresh Diet, Inc. and closely related companies. Defendant Hussain worked out of the Fresh Diet, Inc.'s Brooklyn facility and maintained an office there.
- 7. Defendant Hussain's assistant was Owen Dacres. Defendant Hussain referred to Mr. Dacres as the assistant manager.
- 8. Throughout my employment, I often worked significantly in excess of forty (40) hours a week, yet was never paid overtime compensation of one and one-half (1.5) times my regular rate of pay.
- 9. During my employment with the Defendants, I interacted with other drivers/food delivery employees on a daily basis. I therefore know that my own experiences were typical of

how we were all supervised and compensated. Moreover, my duties, tasks and responsibilities were, in all material respects, the same of these other drivers and/or food delivery employees.

- 10. Based on my personal knowledge, which includes my personal experiences and observations, as well as my conversations with other drivers/food delivery employees, the following is true:
 - (a) All drivers who worked for Defendants in the New York City area (the "New York City-area drivers") were under the supervision, direction and control of Defendant Hussain;
 - (b) All assignments were received from Defendant Hussain, and the New York City-area drivers had to do the work they had been assigned;
 - (c) All New York City-area drivers had to report to Defendant Hussain at the beginning and end of each shift that they worked. At the end of their shifts, all New York City-area drivers had to report how many meals they had delivered, how many miles they had driven, and how many stops they had made. They also had to return empty bags. New York City-area drivers who did not comply with these requirements were subject to discipline, up to, and including termination;
 - (d) All New York City-area drivers were expected to report to work at specific times. The schedules were created by Defendant Hussain. New York City-area drivers could not decide when to show up for work. If they did not arrive to work at the assigned times they were subject to discipline, up to, and including termination;
 - (e) None of the New York City-area drivers was at liberty to choose their assignments. They could not refuse to do the work that they were assigned;
 - (f) All New York City-area drivers had to complete the routes that they had been assigned and to report back to Defendant Hussain. If they failed to complete their assigned routes or if they missed an assigned stop, they were subject to discipline, up to and including termination;
 - (g) Defendant Hussain could change driver schedules and reduce or increase assignments at his complete discretion, without advance notice to the New York City-area drivers;
 - (h) All New York City-area drivers performed the same type of work. That is, each one showed up to The Fresh Diet, Inc.'s Brooklyn facility at his or her assigned time, each would receive his route assignment for his

- shift, each one would take the food that was prepared in the kitchen, by the kitchen staff, and then deliver it. There were no meaningful differences between the duties, tasks and responsibilities of the different drivers;
- (i) The work was completely standardized. All drivers had to deliver the food in the exact same way, each meal had to be delivered in a bag provided by The Fresh Diet, Inc., and drivers then had to return to the Brooklyn facility. What any New York City-area driver did as far as delivering meals to customers was the same as what any other driver did, apart from their specific delivery route;
- (j) New York City-area drivers could not arrange with one another to change their assignments without those changes being authorized in advance by Defendant Hussain;
- (k) New York City-area drivers who attempted to change their assignments without first obtaining Defendant Hussain's approval were subject to discipline, up to and including termination;
- (1) Any driver who deviated from $\P 10(a)-10(k)$ was subject to discipline, up to and including termination;
- 11. In addition to myself, I am aware and have personal knowledge that the Defendants employed many other similarly situated drivers and/or food delivery employees and routinely failed to pay them overtime compensation of one and one-half times their regular rates for those hours that they worked in excess of forty (40) per week.
- 12. I have reviewed the list of drivers and/or food delivery employees attached as Exhibit A, which I understand was produced by the Defendants in this action on or about December 21, 2012. I recognize the majority of persons listed. These persons also worked as drivers/food delivery employees for the Defendants. The individuals whose names I recognize had the same duties, task and responsibilities that I had. Each person whose name I recognize reported to Defendant Hussain and was subject to his supervision, direction and control.
- 13. I fully understand my responsibilities and duties as a class representative, should I be designated as such, and particularly that I would owe a duty of loyalty to the class that I represent. I understand that this means that I must look after the interests of the class, and will

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undertake my best efforts to vigorously prosecute the action on the class members' behalf and ensure that the class is treated fairly and its interests are protected. I will make myself available to participate in all activities required to conduct the case in a professional and effective manner, including, but not limited to locating witnesses, documents, and evidence, submitting to depositions and examinations, and attending conferences. I will not compromise the interests of the class members for my own personal gain.

14. I declare under perjury that the foregoing is true and correct.

KENNETH CHOW

Sworn to before me on February 1, 2013

Notary Public -

State of New York

Peter John Andrews Notary Public - State of New York No. 02AN6235372 Qualified in New York County

My Commission Expires 2/07/2015

EXHIBIT A

Pavroll Name	Address Line 1	Address Line 2	Citv	State/Province	Zip/Postal Code
Acklin, Marquis P	3236 Seymour		Bronx	NY	10469
Alexander, Banite	45b Birch Rd		Cedar Grove	Z	07009
Alvarez, Julian	1245 Stratford Ave	Apt B-4	Bronx	NY	10472
Au, Vinh V	2069 E 14th St		Brooklyn	NY	11229
Banite, Chimeye Z	45 Birch Rd		Cedar Grove	L	07009
Barnett, Antione Tony	220 WOODWOLPH AV.	APT 1	Yonkers	NY	10701
Barrett, Michael A	6994 136th St		Flushing	NY	11367
Bermejo, Maria	95 Vanderveer St		Brooklyn	NΥ	11207
Bloomfield, Leonard S	280 Parkside Ave	Apt D1w	Brooklyn	NY	11226
Bonillia, Gladys M	4 River Rd	Apt 3k	Roosevelt	NY	10044
Brito, Rafael A	86-13 101 St		Richmond Hill	NY	11418
Britt, Jai	800 Soundview Ave		Bronx	NY	10473
Brown, William W	282 E 29th St		Brooklyn	NY	11203
Burgos, Angel L	252 Osborn St	Apt #2c	Brooklyn	NY	11212
Byrd, Shantel	112 Hoyt St	#2J	Stamford	СТ	06905
Castillo, Nelson	66 Elm St		Staten Island	NY	10310
Castro, Omar R	1296 Sheridan Ave	2c	Bronx	ΥN	10456
Chow, Kenneth	3137 Coney Island Ave		Brooklyn	ΥN	11235
Chowdhury, Syed A	134-01 86th Road		Richmond Hill	ΥN	11418
Cines, Keyla	122 Tribow St	Apt #1	Brockton	MA	02301
Coleman, Boyce	24 Fairview St		Waterbury	СТ	06710
Collado, Irving E	Po Box 560192		College Point	NY	11356
Colon, Carlos	1725 Randall Ave	#2C	Bronx	NY	10473
Correa, Juan C	247 Woodbine St		Brooklyn	NY	11221
Crespo, Jessica Y	4 River Road	Roosevelt Island	New York	NY	10044
Cruz, Adolfo	808 Park Ave	#1F	Brooklyn	NY	11206
Cynthia, Fincher M	5800 Arlington Ave	Apt 5s	Bronx	NY	10471
Dacres, Owen A	1003 Willmohr St	Apt B2	Brooklyn	NY	11212
Dardaine, Wilton A	342 Fenimore ave		Uniondale	NY	11553
Datilus, David E	1283 Brooklyn Ave	Apt #1	Brooklyn	NY	11203
Deandre, Harris L	197 Drake Ave.	1D	Yonkers	NY	10805
DeLarosa, Denny M	2405 1st Ave	#86	New York	NY	10035
Dionicio, Julio	442 160th St	#4d	New Yourk	NY	10032
Ezequiel, Ortiz	3760 Notch St		Macugie	PA	18062
Fenton, Damian C	550 Cauldwell Ave	#15E	Bronx	NY	10455
Figeroux, David	347 Bedford Ave		Uniondale	NY	11553

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C 139-16 232nd St Laurelton NY er K 135-36 229 th St Lauretton NY / K 4230 Hill Avenue Bronx NY 279 Plateau Ave Fort Lee NJ NY 130-32 236th St Laurelton NY 150 Lefferts Ave #5B Brooklyn NY 17 Hill St 2l Brooklyn NY 3760 Notch Street 2l Macungie PA 1587 Carrol St 3d Brooklyn NY 1587 Carrol St Apt #4 Brooklyn NY 93 William St Apt #4F Yonkers NY 472 Franklin Ave Apt 22 Mount Vernon NY	11435	NY	Jamaica		149-03 85th ST	Hussain, Syed A
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Js K 139-16 232nd St Laurelton NY ppher K 135-36 229 th St Lauretton NY lony K 4230 Hill Avenue Bronx NY J 279 Plateau Ave Fort Lee NJ 130-32 236th St Laurelton NY Laurelton NY	11225	NY	Brooklyn	#5B	150 Lefferts Ave	Green, Eric D
Js K 139-16 232nd St Laurelton NY pher K 135-36 229 th St Lauretton NY lony K 4230 Hill Avenue Bronx NY J 279 Plateau Ave Fort Lee NJ Laurelton NY	11422	NY	Laurelton		130-32 236th St	Graham, Errol
k K 139-16 232nd St Laurelton NY bher K 135-36 229 th St Lauretton NY bny K 4230 Hill Avenue Bronx NY 279 Plateau Ave Fort Lee NJ	11422	N Y	Laurelton		130-32 236th St	Graham, Errol
139-16 232nd St	07024	Z	Fort Lee		279 Plateau Ave	Gorrin, Daniel J
139-16 232nd St Laurelton NY 135-36 229 th St Lauretton NY	10466	NΥ	Bronx		4230 Hill Avenue	Freeman, Anthony K
139-16 232nd St Laurelton NY	11413	NY	Lauretton		135-36 229 th St	Folkes, Christopher K
100 10 000	11413	NΥ	Laurelton		139-16 232nd St	Figueroa, Jesus K

Ramirez Luis B	165 Nagle Ave	#61	New York	NY	10040
Rijos Jr, Carlos	1711 Lacombe Ave	Apt 2c	Bronx	NY	10473
Rivas, Reginald	183 Sedgwick Ave	2nd Flr	Yonkers	NY	10705
Rodriguez, Michael J	351 E 21 St	Apt 4a	Brooklyn	NY	11226
Rosado, Jose	2039 Cruger Ave	#6a	Bronx	NY	10462
Rose, Alquon	141-54 184th St		Sprigfield Gard	NY	11415
Rose, Brandon	3546 Corsa Ave		Bronx	NY	10469
Ruiz, Jose A	63-17 83 rd PI		Middle Village	NY	11379
Ruiz, Josue	474 Suydam St		Brooklyn	NY	11237
Salas, Andres	322 Rodney St		Brooklyn	N Y	11211
Salazar, Diana	35-63 79th St	#4d	JAckson Heights	NY	11372
Shamsuzzoha, Nafis	1604 Metropoltan Ave	Apt 6f	Bronx	NY	10462
Soohoo, Wendy	32-22 Murray Lane		Flushing	NY	11354
Spence, Andrew O	121 So 14th Ave	Apt 2	Mount Vernon	NY	10550
Syed, Tabish	149-03 85th Rd		Jamaica	NY	11435
Tate, Joseph L	138-53 Sprigfield	Blvd	Sprigfield Gard	NY	11413
Tavares, Maria	316 E 184th St	Apt #1	Bronx	NY	10458
Torres, Barron	80 School St		Yonkers	NY	10701
Traverzo, Drew	17 Van Siclen	#3d	Brooklyn	NY	11207
Velez, Claudia M	1735 Madison Ave	#3A	New York	NY	10029
Vines, Donald M	13602 Tree Leaf Ct		Upper Marlboro	NY	20774
White, Bryant	41 Hawthorne Ave	Apt 3a	Yonkers	NY	10701
William, Still P	39 Winfred Ave	Apt #2	Yonkers	NY	10704
Williams, David	39 Convent Ave		Yonkers	NY	10703
Wright, Leanora P	1587 Carrol St	#3D	Brooklyn	NY	11213
Zapata Abrey, Alexander	555 Fdr Drive	1b	New York	N Y	10002